

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 98-O-07**

DATE ISSUED: April 24, 1998

ISSUED TO: Norbert Sickler, Administrator, Southwest Multi-County Correction Center

CITIZEN'S REQUEST FOR OPINION

On April 2, 1998, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Kerry Schorsch asking whether the Southwest Multi-County Correction Center (SWMCCC) violated N.D.C.C. § 44-04-18 by refusing to mail copies of approved minutes, draft minutes, and notes of certain SWMCCC Board meetings upon request and by refusing to deny copies of the requested records in writing.

FACTS PRESENTED

Mr. Schorsch's request for this opinion stems from N.D.A.G. 98-O-04. That opinion responded to several allegations against the SWMCCC, including its alleged failure to comply with Mr. Schorsch's requests for approved minutes, draft minutes, and notes for SWMCCC Board meetings held in August 1997, on December 4 and 8, 1997, and on January 12, 1998. N.D.A.G. 98-O-04 concluded:

7. It is my further opinion that it was not unreasonable to delay providing copies of the official notes of SWMCCC Board meetings until draft minutes were prepared based on the notes, as long as work was continuing on the draft minutes during the delay, and the notes were made available by the next SWMCCC Board meeting at the latest.

...

9. It is my further opinion that a written denial was not required for the requests for copies submitted by Kerry Schorsch on December 19, 1997, and January 22, 1998, because the provision of the copies was delayed rather than denied.

N.D.A.G. 98-O-04.

In response to an inquiry from this office, SWMCCC Administrator Norbert Sickler has indicated that all the requested records, except for notes of the December meetings, were mailed to Mr. Schorsch in "the latter part of January, 1998." Mr. Schorsch has indicated that he did not receive the copies until he went to the SWMCCC on April 3, and he has still not received copies of the December meeting notes. Mr. Sickler has

ATTORNEY GENERAL OPEN RECORDS AND MEETINGS OPINION

April 24, 1998

Page 2

explained that the notes were thrown away sometime after Mr. Schorsch first requested the notes on December 11, 1997. When the notes were first requested, access was not immediately provided because the notes were currently being used to prepare minutes of the meetings.

ISSUES

1. Whether the SWMCCC failed to provide and mail copies of minutes and notes of SWMCCC Board meetings, as required in N.D.C.C. § 44-04-18, when it mailed the copies in late January (except for notes of the December meetings) but those copies were not received by the person requesting the copies.
2. Whether the SWMCCC violated N.D.C.C. § 44-04-18 when it threw away the notes of the December meetings of the Board after copies of the notes had been requested and before copies had been provided.
3. Whether the SWMCCC violated N.D.C.C. § 44-04-18(6) when it did not deny copies of the notes of the December meetings of the Board in writing as requested at the time the SWMCCC decided to discard the notes or actually discarded the notes, whichever occurred first.

ANALYSES

Issue One:

In N.D.A.G. 98-O-04, I concluded that copies of draft minutes of SWMCCC Board meetings had to be provided upon request as soon as the draft minutes were prepared, but that the SWMCCC could wait to provide copies of official notes of the meetings as long as the notes were being used to prepare the draft minutes. Both the requested draft minutes and notes had to be made available by the next SWMCCC Board meeting.

SWMCCC Administrator Norbert Sickler indicates that he mailed all the requested records to Mr. Schorsch, except the December meeting notes, in late January. Mr. Schorsch says he never received the copies and doubts the copies were actually mailed. For purposes of this opinion, we will assume that the copies were mailed and simply not received. See N.D.C.C. § 44-04-21.1 (disputed facts resolved in favor of public entity). Even if Mr. Schorsch did not receive the copies, it is my opinion that the SWMCCC satisfied the requirements of N.D.C.C. § 44-04-18 by mailing the requested copies.

ATTORNEY GENERAL OPEN RECORDS AND MEETINGS OPINION

April 24, 1998

Page 3

Issue Two:

When Mr. Schorsch originally requested copies of the official notes of the December 4 and 8 meetings on December 11, the notes were not provided to him. Mr. Sickler previously explained to this office that access to the notes was delayed under N.D.C.C. § 44-04-18(8) while the notes were being used as "working papers" to create draft minutes for approval by the SWMCCC Board. However, when the draft minutes were prepared, the notes were apparently thrown away rather than provided to Mr. Schorsch. The SWMCCC does not dispute that the notes were thrown away after Mr. Schorsch requested copies of those notes and before any copies were provided to him.

This office has not specifically addressed the question of whether records or copies of records that have been requested under N.D.C.C. § 44-04-18 can be thrown away or otherwise destroyed before being provided to the requester. N.D.C.C. § 44-04-18 grants members of the public a right to have access to and copies of open records upon request. Unless an applicable new exception to N.D.C.C. § 44-04-18 becomes effective in the short amount of time between when a request is made and when the request is granted, the public entity is required to grant a request for access or copies. A public entity cannot avoid this constitutional and statutory requirement simply by destroying the requested records. Therefore, it is my opinion that once a request is made for open records, N.D.C.C. § 44-04-18 prohibits the public entity from discarding those records, even if the public entity is otherwise not required to retain the records. Accordingly, it is my further opinion that the SWMCCC violated N.D.C.C. § 44-04-18 when it threw away records that were subject to a pending request for access or copies without first providing copies of the records.

Issue Three:

When a public entity receives a request for access to or copies of records, the public entity must either grant the request within a reasonable time or else explain the legal authority for not granting the request. N.D.C.C. § 44-04-18(6). Upon request, the explanation must be made in writing. Id. When the SWMCCC finished using the notes to prepare minutes of the December meetings and threw the notes away, the SWMCCC was no longer delaying access to the notes and instead was effectively denying Mr. Schorsch's request. It is my opinion that this denial was required to be made in writing as requested by Mr. Schorsch.

CONCLUSIONS

1. It is my opinion that the SWMCCC complied with N.D.C.C. § 44-04-18 when it mailed copies of the requested records, even if those copies were not received.

ATTORNEY GENERAL OPEN RECORDS AND MEETINGS OPINION

April 24, 1998

Page 4

2. It is my opinion that the SWMCCC violated N.D.C.C. § 44-04-18 when it threw away the notes of the December meetings after copies of the notes had been requested and before copies had been provided.
3. It is my opinion that the SWMCCC violated N.D.C.C. § 44-04-18(6) when it did not deny copies of the notes of the December meetings of the Board in writing as requested at the time the SWMCCC decided to discard the notes or actually discarded the notes, whichever occurred first.

STEPS NEEDED TO REMEDY VIOLATIONS

The notes have been thrown away, so the SWMCCC's failure to provide copies of the notes upon request cannot be completely remedied. Minutes of the meetings are available, but the notes of the meetings would help confirm the accuracy of the minutes. To effectively replace the use of the notes, the SWMCCC Board must confirm the accuracy and completeness of the minutes of its December 4 and 8 meetings by reconsidering those minutes and making any necessary corrections. Copies of the minutes, if changed, must be provided to Mr. Schorsch.

A written denial of the request for the December meeting notes is not necessary because Mr. Schorsch will receive a copy of this opinion containing the SWMCCC's explanation why copies of the requested records were not provided, i.e. the records were thrown away.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: James C. Fleming
Assistant Attorney General